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No. 81-55

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

THE PEOPLE OF THE STATE OF NEW YORK,

Petitioner,

—against—

PAUL IRA FERBER,

Respondent.

ON WRIT OF CERTIORARI TO THE
NEW YORK STATE COURT OF APPEALS

MOTION FOR LEAVE TO FILE A BRIEF *AMICUS CURIAE* AND *AMICUS CURIAE* BRIEF

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Covenant House hereby respectfully moves for leave to file the attached brief *amicus curiae* in support of The People of the State of New York in this case. The consent of the attorney for the petitioner has been obtained. The consent of the attorney for the respondent was requested but no response was received.

Interest of Covenant House

Covenant House is a New York not-for-profit corporation. Its principal activity has always been child care, first in group homes providing long-term care to small groups of homeless children, then, beginning in 1977, extending temporary shelter, care and counselling to thousands of runaway or destitute children annually (7,360 new cases in 1980

alone). Covenant House's Under 21 crisis shelter, located in the Times Square area of Manhattan, includes a fully staffed medical clinic, a public school, a battery of professional social workers, a large child-care staff, a cafeteria serving three meals a day, and accommodations for approximately 200 children per night.

The location of the Under 21 center and its no-strings open-intake policy have brought Covenant House into constant confrontation with the sex industry that dominates the Times Square landscape and feeds upon the desperation of the young people attracted there. The majority of the children housed at Under 21 have been sexually exploited at least in the sense of having been forced to trade sex for food or shelter. A significant minority has been used in the production of child pornography. As Covenant House is one of a tiny number of organizations with significant experience in caring for sexually exploited children, it has the obligation to represent the interests of those children before this Court in a case as critical as this for their future.

Importance of Case for Sexually Exploited Children

Because this case arose as a criminal action, its issues have been largely framed as a clash between the power of the state and the purported First Amendment rights of the respondent. Left out of the analysis—because of the incapacity of the parties and the court below to understand the scope of the problem—has been a serious consideration of the interests of the victims of the "kiddie porn" industry.

As outlined in the attached brief, those interests are not tangential to this case—they are fundamental. The distribution of child pornography not only seriously extends and deepens the injuries to children from the production of

such material, but it causes, too, harms completely distinct from the original sexual exploitation. New York was fully justified, based on the privacy interest of the children involved, in prohibiting the distribution of certain specifically defined varieties of child pornography.

Covenant House in its attached brief brings to this case a consideration of this central privacy issue, and attempts in factually oriented appendices to outline the wealth of material bearing on the subject of sexual exploitation of children. Analysis is included, as well, of the criminal nature of distributing "kiddie porn" on the basis of the illegality of its production under state and federal law. The interface of the First Amendment with the special characteristics of photographic "speech" is the final topic considered.

Once before, in September, 1981, Covenant House requested leave of this Court to file a brief *amicus curiae* in this case in support of New York's petition for a writ of certiorari. On November 16, 1981, the Court granted that motion and, far more importantly, granted the writ of certiorari. Covenant House in its new brief has attempted to explore in greater depth the arguments which it was able only to outline in its earlier brief. Again Covenant House believes it may have something of value to contribute to this troubled controversy, but this motion is of only minor moment compared with the lives and the principles at stake in this case. Above all, therefore, Covenant House respectfully begs the Court to weigh those interests carefully and, ultimately, to reverse the decision of the New York Court of Appeals.

Respectfully submitted,

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Movant-Amicus Curiae

Questions Presented

1. Can a state act to protect the privacy of children who are being exhibited in specifically defined, graphic sexual activity by banning the distribution of material containing such exhibitions of children?

2. Does the State's interest in suppressing the criminal conduct of using children in specifically defined, graphic sexual performances justify the prohibition of promoting such performances, where such promotion extends and deepens the harms of the underlying crime?

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BRIEF *AMICUS CURIAE*

Statement of Interest

As more fully explained in the accompanying motion, Covenant House is a non-profit organization dedicated to the shelter and care of destitute children. Most of the thousands of children in its care each year have been sexually exploited, many have been involved in pornography. Covenant House is before the Court as amicus curiae representing the victims of the "kiddie porn" industry.

Summary of Argument

The distribution or exhibition of material depicting children engaged in such graphic sexual activity as masturbation, normal or deviate sexual intercourse, sado-masochistic abuse or bestiality causes severe harms to the children in-

volved. Those harms are distinct from the damage to "kiddie porn" performers in the production of the material—and at least as serious. New York, in Penal Law § 263.15,* prohibited the promotion of specifically defined sexual performances by children in order to serve two vital state interests: (1) protection of the privacy of the children induced to participate in such performances; and (2) suppression of conduct that compounds the original crime of producing child pornography by inflicting the further harms involved with its distribution.

New York's assault on the sexual exploitation of children in no way dilutes First Amendment guarantees of free expression. Those guarantees do not permit the nonconsensual invasion of children's privacy through public display of their most intimate conduct. Nor does the First Amendment prevent the proscription of speech in furtherance of an illegal activity—here the federal and state crimes of producing child pornography. The harms from promoting even technically "non-obscene" child pornography far outweigh any political, social or intellectual benefit from such activity. Because children's sexual performances cannot be consensual in any meaningful sense, their exhibition involves none of the traditional rationale for protecting individual self-expression. Prohibition of explicit "kiddie porn" amounts to no more than a reasonable regulation of the manner in which film makers and distributors may exercise their First Amendment rights.

The majority decision below, overruling the trial and lower courts and invalidating New York Penal Law § 263.15, failed to consider the special harms to children incident to distribution of sexually explicit films in which they appeared. The court thus improperly invoked the First Amendment, and its decision should be reversed.

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* New York Penal Law § 263.15 is reprinted in Appendix F.

Introduction

> *To turn [a child] loose to an unrestrained liberty before he has reason to guide him is not the allowing him the privilege of his nature to be free, but to thrust him out amongst brutes and abandon him to a state as wretched and as much beneath that of a man as theirs.* John Locke, *The Second Treatise of Government* (1690)

> *Have mercy on the youth of both sexes; protect them from their ignorance and inexperience; protect one part of life by the wisdom of another; protect them by the wisdom of laws and the care of Nature.* Edmund Burke, *Speech on Repeal of the Marriage Act* (1781)

Minds as different in their political orientations as Locke and Burke have shared at least one assumption about government: its importance in protecting the young from their naiveté. In our own time the United Nations has demanded that: "The child shall be protected against all forms of neglect, cruelty and exploitation. He shall not be the subject of traffic, in any form." [1] It is only common sense that "childhood is a particularly vulnerable time of life," *Parham* v. *J.R.*, 442 U.S. 584, 628 (1979) (Brennan, J., concurring), and it is a basic assumption of civilized society that the state has a "parens patriae interest in helping parents care for . . . their children." *Id.* at 605.

This Court has always been particularly sensitive to that assumption, permitting the states to shield children from child labor, even in service of proselytizing religious ideas, *Prince* v. *Massachusetts*, 321 U.S. 158 (1944); to protect them from viewing even nonobscene sexually explicit material, *Ginsberg* v. *New York*, 390 U.S. 629 (1968); to guard

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[1] G.S. Resolution 1386 (XIV), 841st Plenary Meeting, Nov. 20, 1959, Principle 9.

them from premature sexual experience, *Michael M.* v. *Sonoma County Superior Court*, 450 U.S. 464, 472 n. 8 (1981); and, after such experience, to protect them against ill-considered parental interference with their decision whether to have an abortion. *Planned Parenthood of Central Missouri* v. *Danforth*, 428 U.S. 52 (1976); *Bellotti* v. *Baird*, 443 U.S. 622, 634-36 (1979) (*Bellotti II*). These decisions only suggest the "variety of protective measures," ranging from commercial constraints to restrictions on marriage, that are justified by the "State's interest in the welfare of its young citizens." *Planned Parenthood of Central Missouri* v. *Danforth*, *supra*, 428 U.S. at 102 (Stevens, J., dissenting).

In 1977 the State of New York and indeed the entire nation was confronted with an extraordinary threat to that welfare, an example of "traffic" in children unmatched since the darkest hours of child labor: child pornography. During that year the U.S. Senate Judiciary Committee concluded, based on extensive hearings, that "child pornography and child prostitution have become highly organized, multi-million dollar industries that operate on a nationwide scale," and that "the use of children . . . as the subjects of pornographic materials is very harmful to both the children and the society as a whole." [2] In response, the federal government and most of the states adopted a series of criminal statutes aimed at the "kiddie porn" plague.[3] Most notable of these is the New York statute under review, a

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[2] Senate Committee on the Judiciary, Protection of Children Against Sexual Exploitation Act of 1977, S. Rep. No. 438, 95th Cong., 1st Sess. 5 (1977).

[3] The Protection of Children Against Sexual Exploitation Act of 1977, 18 U.S.C. §2251-2253 (Supp. III 1979). Some 46 states enacted special laws directed at child pornography during the same period. For a listing of those statutes and a classification of them by approach taken, see Appendix A.

prohibition of the "promotion" (including the exhibition or distribution) of "sexual performances" by children.[4] While carefully defining "sexual performance" to include only very explicit sexual activity,[5] rather than harmless nudity, the New York legislature refused to require proof of the *legal obscenity* of the performance as a predicate to liability.[6]

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[4] N.Y. Penal Law §263.15. The text of the law is reprinted in Appendix F.

[5] The sexual activity covered is limited to "sexual intercourse, deviate sexual intercourse, sexual bestiality, masturbation, sadomasochistic abuse, or lewd exhibition of the genitals." N.Y. Penal Law §263.00 (1).

[6] Thirteen other states also refused to require obscenity as an element of the offense of distributing child pornography. See Appendix A.

It is important to note in viewing the New York statute that "exhibition of the genitals" is prohibited only if it is "lewd". See note 5, *supra*. "Lewd" is generally considered a synonym for "obscene" in construction of statutes such as this one. *Manual Enterprises, Inc.* v. *Day*, 370 U.S. 478, 483 n. 4 (1962) (Opinion of Harlan, J.). *Accord, Hamling* v. *United States*, 418 U.S. 87, 112 (1974). Thus New York Penal Law §263.15 must be construed to include nudity only if such nudity is legally "obscene". Respondent's fears about the prohibition of films containing "mere nudity," Respondent's Brief in Opposition to Petition for a Writ of Certiorari [hereinafter cited as *Respondent's Brief*] 10, are therefore convenient but wholly insubstantial chimeras.

One further aspect of N.Y. Penal Law §263.15 requiring brief comment is its prohibition of "simulated" sexual conduct falling within the specific definitions of such conduct in §263.00(3). The statute prohibits depiction of *simulated* sexual conduct *only* when such depiction includes the exhibition of a child's breasts, genitals or buttocks. Thus it is possible to use child performers in sexually suggestive roles (e.g., "Lolita") so long as their most intimate anatomy is not put on public display. *See, Miller* v. *California*, 413 U.S. 15, 25 (1973).

The statutory definition of "sexual conduct", finally, almost exactly tracks this Court's definition of "hard-core" sexual conduct in *Miller* v. *California, supra*, 413 U.S. at 25. Amicus, therefore, hereinafter refers to the conduct defined by the New York statute as "hard-core."

This case presents the question whether in so exercising its *parens patriae* responsibility for its children New York transgressed rights guaranteed by the First Amendment. Overruling lower courts, the New York Court of Appeals concluded that the statute in question does violate "the freedom of speech" because it curtails the distribution of material without regard to its obscenity. *People* v. *Ferber*, 52 N.Y.2d 674, 678 (1981).

When viewed against the strong tradition of judicial concern for the welfare of children, the decision of the Court of Appeals seems categorical and wrongheaded in the tradition of *Hammer* v. *Dagenhart*, 247 U.S. 251 (1918). When considered against the harms suffered by children in the distribution of "kiddie porn," however, the decision appears no less than barbaric. Children victimized once in the production of pornography may now be made to suffer, over and over again, the agony of knowing their most intimate, private conduct is the subject of public display in perpetuity. The state must stand idly by while the pornography industry profits from the sale of material whose production is illegal under both federal and state law.[7] Those devoted to the life and spirit of the First Amendment, finally, must watch its greatest phrase, "the freedom of speech," twisted into a synonym for freedom to exploit the bodies of children to express sexual perversion. However sincere the intentions which prompted it, *People* v. *Ferber* is a decision that begs for reversal.

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[7] 18 U.S.C. §2251-2253 (Supp. III 1979). For a discussion of other laws bearing on child pornography, see Appendix A.

The Decision Below

The decision before this Court on writ of certiorari is perhaps best summarized in the words of the dissenting judges of the New York Court of Appeals:

> The majority holds today that the State of New York is without power to prohibit the dissemination of films depicting children of tender years engaging in actual or simulated sexual intercourse, sodomy, sexual bestiality, masturbation, sado-masochistic abuse or lewd exhibition of the genitals unless the child's "performance" is determined to be legally obscene.

People v. *Ferber, supra,* 52 N.Y.2d at 681 (Jasen, J.).

In reaching that conclusion the court presented no single clearly defined line of reasoning; rather, it noted three factors about N.Y. Penal Law §263.15 it found "troublesome," *Id.* at 680: (1) the "overbreadth" of the statute in its potential application to "nonobscene" speech such as "medical or educational materials", *Id.* at 678; (2) the statute's potential application to materials produced outside the State of New York, *Id.* at 679-680; and (3) the "strikingly underinclusive" character of the statute in failing to prohibit the distribution of other materials whose production might entail serious harm to minors. *Id.* at 680-81. Conceding the State's "legitimate interest in protecting the welfare of minors within its borders," *Id.* at 679, the Court determined that the "freedom of speech" of "kiddie porn" promoters swept all before it.

If indeed the harms to children from the "kiddie porn" industry were limited to those from actual *production* of child pornography, the majority's opinion might have a certain mad logic to it—similar to the logical exaltation of the "right of contract" over laborers' welfare in

Lochner v. *New York*, 198 U.S. 45 (1905). One simple fact escaped the majority below, however: that the distribution of "kiddie porn" causes new, distinct, and often searing damage to the children put on public display. It is that damage which makes nonsense of the Court of Appeals' fears for the integrity of the First Amendment.

I.

The State Has a Compelling Interest in Protecting Its Children From Display of Their Sexual "Performances".

A. *Distribution of Child Pornography Causes Serious Harms to the Child Performers Which Are Distinct From the Harms Involved in Its Production.*

In summarizing the various types of sexual abuse to which thousands of children are annually subjected, Dr. Melvin Blumberg recently concluded:

> The most depraved form of sexual misuse of children occurs when they are subjected to acts of intercourse, sodomy, or fellatio for peep shows or for film making for financial gain in pandering to the vicarious lasciviousness of those adults who are but one degree less vile than actual sex offenders.[8]

Other physicians and psychiatrists have concluded that participation in the making of child pornography is "devastating," [9] likely to produce "psychic trauma" and "massive acute anxiety" for the children involved,[10] and "highly

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[8] *Child Sexual Abuse*, 78 N.Y. State J. Med. 612, 613 (1978).

[9] Weeks, *The Sexually Exploited Child*, 69 S. Med. J. 848, 850 (1976).

[10] Schoettle, Child Exploitation: *A Study of Child Pornography*, 19 J. Am. Acad. Child Psych. 289, 296 (1980) [hereinafter cited as *Child Exploitation*]; Schoettle, *Treatment of the Child Pornography Patient;* 137 Am. J. Psych. 1109, 1110 (1980).

destructive to the child's psychological development and social maturation." [11] The psychological trauma is such that it can increase significantly the chance that the sexually abused child will one day grow into a sexual abuser.[12] Serious physical consequences may ensue as well.[13] It is thus beyond serious question that "child sexual exploitation is child abuse." [14]

The actual sexual abuse of children in the making of pornographic films or photos does not end their ordeal; it is only the first chapter. For the child has participated in a "graphic form of exhibitionism . . . [which] literally makes the child's body 'available' for anyone willing to pay the price anywhere in the world." [15] Damaging as the initial sexual abuse may be, "it is the *fear of exposure* and the tension of keeping the act secret that seem to have the most profound emotional repercussions." [16] Au-

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[11] Densen-Gerber, *Child Prostitution and Child Pornography: Medical, Legal and Societal Aspects of the Commercial Exploitation of Children*, reprinted in National Center on Child Abuse and Neglect, U.S. Dept. of Health and Human Services, *Sexual Abuse of Children: Selected Readings* (1980) 80.

[12] Groth, *Sexual Trauma in the Life Histories of Rapists and Child Molesters*, 4 Victimology 10 (1979); R. Sullivan, *Child Molestation*, 19 Am. Fam. Physician 127 (1979).

[13] *See, e.g.*, Ellerstein & Canavan, *Sexual Abuse of Boys*, 134 Am. J. Diseases of Children, 255, 256-57 (1980); Jaffe, *Sexual Abuse of Children: An Epidemiological Study*, 129 Am. Med. J. Diseases of Children 689, 691 (1975); Nelson, *Gonorrhea in Preschool and Prepubertal Children*, 236 J. Am. Med. A. 1359, 1364 (1976); Rauh & Burket, *Adolescent Sexual Activity and Resulting Gynecological Problems*, 13 Med. Aspects Hum. Sexuality 56, 57 (1979).

[14] Geiser, *Hidden Victims*, 118 (1979).

[15] *Child Exploitation, supra* note 10, at 292.

[16] *Id.* at 292 (emphasis added). *See also* Shouvlin, *Preventing the Sexual Exploitation of Children: A Model Act*, 17 Wake Forest L. Rev. 535, 545 (1981); Burgess & Holmstrom, *Sexual Trauma of Children and Adolescents*, 10 Nursing Clinic N. Am. 551 (1975).

thorities familiar with sexual abuse generally agree that "[o]ften the child is more disturbed by the *reaction* that the [sexual abuse] brings forth than from the sexual activity itself." [17] The initial "fear of exposure" coupled with the subsequent public exposure through display of the filmed sexual activity virtually assures profound continuing harm for children whose sexual abuse occurs in front of a camera.

This Court has recently taken judicial notice of the "stigma" or "adverse social consequences" to children and adults who have been committed to mental hospitals, *Parham* v. *J.R.*, 442 U.S. 584, 600 (1979); *Addington* v. *Texas*, 441 U.S. 418 (1979), and judicial notice of human "sensitivity" to "the disclosure of information" about a person's "basic competence". *Detroit Edison Co.* v. *NLRB*, 440 U.S. 301, 318 (1979). For the stars of the "kiddie porn" world, the "social consequences" of their sexual abuse are disastrous. Not only must "the victim of sexual exploitation . . . live the rest of his or her life with those memories of what pornography and deviation brings upon [him or her]," [18] he or she must live with the actual film record of the event. Where the film is widely circulated the child (even into adulthood) must suffer the public humiliation of its

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[17] Herjanic & Wilbois, *Sexual Abuse of Children*, 239 J. Am. Med. A. 331, 333 (1978); Fraser, *Child Pornography*, 95 New Statesman 213 (1978); Peters, *Children Who Are Victims of Sexual Assault and the Psychology of Offenders*, 30 Am. J. Psychotherapy 398, 419 (1976); Schultz, *The Child Sex Victim: Social, Psychological and Legal Perspectives*, 52 Child Welfare 147, 150 (1973); Simrel, *et al.*, *Crisis Management of Sexually Abused Children*, 8 Pediatric Annals 317 (1979).

[18] *Sexual Exploitation of Children, Hearings Before the Subcommittee on Crime of the House Committee on the Judiciary*, 95th Cong. 1st Sess. [hereinafter *Sexual Exploitation of Children I.*], 62-63 (testimony of Inv. Lloyd H. Martin, L. A. Police Dept.).

showing;[19] where the film remains uncirculated the victim must fear blackmail.[20]

It is therefore hopelessly naive to conclude, as did the court below, that regulation of the production of child pornography is alone sufficient to suppress its harms. Even if such an approach could be effective, and the evidence indicates that it could not,[21] the deep harms inflicted by circulation and display of material already filmed would continue for the children victimized in the past.[22] Those children would still face the terrors of public exposure and reaction—and the simple fact that

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[19] *See* Lovelace, *Ordeal* (1980). "Once I'm identified my life falls apart. My husband has to leave his job to protect us and to move us somewhere else. Where I'm recognized again and again, I'm the target of freaks and degenerates." *Id.* at 261.

[20] "It was procedure to keep a blackmail photo file of each boy to avoid any squealing . . . ." Gerald S. Richards, convicted for molesting a 10 year-old boy, filmed, processed, and sold child pornography, and sold the sexual services of his young male models. Sneed, *Father Teacher: Tangled Life of Child Pornographer, Chicago Tribune* (May, 1977), reprinted in *Protection of Children Against Sexual Exploitation, Hearings Before the Subcommittee to Investigate Juvenile Delinquency of the Senate Committee on the Judiciary* [hereinafter *Protection of Children*], 95th Cong., 1st Sess., 135-36 (1977).

[21] A case in point is The Protection of Children Against Sexual Exploitation Act of 1977, 18 U.S.C. §2251-2253 (Supp. III 1979), which prohibited the production of material portraying children in sexually explicit conduct *whether* or *not* the final product was obscene. 18 U.S.C. §2251(a). The statute was heralded at its enactment as the key weapon in a national effort against "kiddie porn," yet according to the United States Department of Justice, only one indictment, and no conviction has ever been obtained under that section of the act.

[22] It is possible, of course, that on substantive due process grounds the distribution of films made prior to the date of the statute's enactment would be constitutionally protected. *St. Martin's Press, Inc.* v. *Carey*, 440 F. Supp. 1196 (S.D.N.Y. 1977), *rev'd on other grounds*, 605 F.2d 41 (2d Cir. 1979). This particular statute has, however, been construed to exclude such films from its coverage. *St. Martin's Press, Inc.* v. *Carey*, 605 F.2d 41, 44 (2d Cir. 1979).

"[t]he victim's knowledge of publication of the visual material increases the emotional and psychic harm suffered by the child." [23]

The special psychological and social harms suffered by the "kiddie porn" performer through distribution of the material also make nonsense of the Court of Appeals' finding that the New York statute is "underinclusive" for failing to cover portrayals of other harmful activity such as "dangerous stunts". *People* v. *Ferber, supra,* 52 N.Y.2d at 680-81. Other types of "dangerous" performances, while arguably as hazardous to a child's well-being as sexual abuse, do not, when subsequently shown, cause *new* harms to the child, as does the display of pornographic material. *See, Erznoznik* v. *City of Jacksonville,* 422 U.S. 205, 215 (1975). A child may be injured performing a circus trick, but its subsequent showing in local theatres will not cause "profound emotional repercussions" and the "stigma" that display of the child's involvement in masturbation, bestiality or sado-masochistic abuse would create. New York aimed its arsenal narrowly, and hit the *precise* target intended.

B. *Production and Distribution of Child Pornography Occur Without the Informed Consent of the Minors Involved.*

What makes the use of children in pornography, as opposed to the use of adults, so damaging and so loathesome is that "kiddie porn" is a traffic in slaves. Children, unlike their elders, simply cannot give an "informed consent" to sexual activity.[24] They are "ignorant about sex

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[23] *Protection of Children from Use in Pornography,* 12 J. L. Ref. 295, 301 (1979) (citing an interview with Ann Thompson, consulting child psychiatrist to the U. of Mich. Interdisciplinary Project on Child Abuse and Neglect). *See,* Shouvlin, *supra* note 16, 17 Wake Forest L. Rev. at 545.

[24] A. Rosenfeld, *Treating Victims of Incest,* 8 Br. J. Sexual Med. 5 (1981).

and sexual relationships," "unfamiliar with the mechanics of sex and reproduction," and "generally unaware of the social meanings of sexuality," including "what likely consequences [the sexual act] will have for them in the future."[25] In the context of sexuality and procreation, the members of this Court have been consistently mindful of children's "inability to make decisions in an informed, mature manner." *Bellotti* v. *Baird*, 443 U.S. 622, 634 (1979) (*Bellotti II*) (Opinion of Powell, J.), & 656-57 (White J., dissenting); *Carey* v. *Population Services International*, 431 U.S. 678, 693, n. 15 (1977) & 714 (Opinion of Stevens, J.); *Planned Parenthood of Central Missouri* v. *Danforth*, 428 U.S. 52, 72 (1975) & 95 (White, J., dissenting) & 102 (Stevens, J., dissenting); *Bellotti* v. *Baird*, 428 U.S. 132, 147 (1976) (*Bellotti I*). Last term, indeed, the Court specifically recognized the right of the State to forbid sexual intercourse among the young. *Michael M.* v. *Sonoma County Superior Court*, 450 U.S. 464, 472 n. 8 (1981) & 482-83 (Blackmun, J., concurring) & 496-97 (Stevens, J., dissenting).

The nonconsensual character of child sexual exploitation is severely aggravated by the character of the "kiddie porn" industry, where seduction, coercion, and blackmail are an entrepreneur's most vital skills.[26] Parental influence, incredibly, is all too often thrown behind those desiring to profit from a child's sexual activity.[27] A photographic recording of that activity must therefore be regarded as virtually stolen from the child—a hideous trophy for the seduction or rape of the young.

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[25] D. Finkelhor, *What's Wrong With Sex Between Adults and Children*, 49 Am. J. Orthopsychiatry 692, 694-95 (1979).

[26] *See* Appendices C and D.

[27] *See* Appendix C.

C. *The Nonconsensual Injuries to the Privacy of a Child Caused by Distribution of His or Her Sexually Explicit Performances Justify and Compel the State's Intervention.*

If the film of a 12 year-old boy masturbating may be called "speech," it is "speech" which "by [its] very utterance inflict[s] injury." *Chaplinsky* v. *New Hampshire*, 315 U.S. 568 (1942). Manipulated or coerced into sexual activity, the child must live with a public, or potentially public, recording of the abuse. New York is attempting, against the guile of pornography merchants and the obtuseness of its own Court of Appeals, to protect children from the invasion of privacy and poisoning of reputation which such a filmed record of specifically defined "hard-core" sexual activity inevitably causes. In that effort no legitimate "speech" will be suppressed, and no damage to the First Amendment will be sustained.

That display of a child in the midst of sexual intercourse, masturbation, bestiality or the like invades his or her privacy is beyond cavil. *See, York* v. *Story*, 324 F.2d 450, 455 (9th Cir. 1963), *cert. denied*, 376 U.S. 939 (1964).[28] Sexuality is at the very core of the personal privacy interest for minors as well as adults. *Bellotti II*, 443 U.S. 622 (1979); *Roe* v. *Wade*, 410 U.S. 113 (1973); *Griswold* v. *Connecticut*, 381 U.S. 479 (1965).[29] Whether considered from the standpoint of (1) "the individual interest in avoiding disclosure of personal matters" or (2) "the interest in independence in making certain kinds of important decisions"—the two prongs of the "privacy" interest articulated by this Court in *Whalan* v. *Roe*, 429 U.S. 589, 599-600 (1977) (footnotes omitted)—the nonconsensual replaying of a child's sexual

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[28] *See also, Forts* v. *Ward*, 434 F.Supp. 946 (S.D.N.Y. 1977), *rev'd on other grounds*, 566 F.2d 849 (2d Cir. 1977).

[29] The American concern for privacy in sexual matters is deeply rooted in our past. *See*, Flaherty, *Privacy in Colonial New England* 79-83 (1972).

activity for strangers is gross intrusion on that interest. *York* v. *Story*, *supra*, 324 F.2d at 455.

The "impressive credentials" [30] of the general "right of privacy," date back to the celebrated article of Samuel Warren and Louis Brandeis, *The Right of Privacy*.[31] Now that right receives full recognition in both state and federal courts.[32] Whatever its "developing distinctions and nuances," [33] the legally protectible interest in privacy clearly fits the outrageous conduct proscribed by New York's child pornography statute.[34]

To confront the problem of child pornography head on, therefore, the Court must address a question it has care-

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[30] *Cox Broadcasting Corp.* v. *Cohen*, 420 U.S. 469, 489 (1975).

[31] 4 Harv. L. Rev. 193 (1890). *See, Katz* v. *United States*, 389 U.S. 347, 350-51 (1968).

[32] *See*, W. Prosser, Handbook of the Law of Torts, §§117, 810-812 (4th Ed. 1971); Prosser, *Privacy*, 48 Cal. L. Rev. 383 (1960). Federal cases based on the "right to be let alone by other people" include *York* v. *Story*, 324 F.2d 450 (9th Cir. 1963), *cert. denied*, 376 U.S. 939 (1964), and *Dietemann* v. *Time, Inc.*, 284 F.Supp. 925 (C.D. Cal. 1968), *aff'd*, 449 F.2d 245 (9th Cir. 1971). *But cf.*, *Rosenberg* v. *Martin*, 478 F.2d 520 (2d Cir. 1973), *cert. denied*, 414 U.S. 872 (1973) (use of 42 U.S.C. §1983 to vindicate privacy rights not generally favored absent "outrageous" circumstances).
In *Gelbard* v. *United States*, 408 U.S. 41 (1972) this Court noted with approval that the anti-wiretapping provisions of Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. §2510-2529, were the results of Congressional desire for "the protection of privacy". 408 U.S. at 48.

[33] *Zacchini* v. *Scripps-Howard Broadcasting Co.*, 433 U.S. 562, 571 (1977).

[34] At least three of the four "branches" of privacy law recognized by Prosser in his article *Privacy*, *supra* note 32, and by the Restatement (Second) of Torts (1977) are relevant to the distribution of child pornography: (1) "intrusion" into the "private affairs or concerns" of another, *Id.*, §652B; (2) "appropriation" of a name or likeness, *Id.*, §652C; and (3) publicity given to private personal affairs of "no legitimate concern" to the public. *Id.*, §652D.

fully, almost painstakingly, left open: "whether the State may ever define and protect an area of privacy free from unwanted publicity." *Cox Broadcasting Corp.* v. *Cohen*, 420 U.S. 469, 491 (1975). *See, Time, Inc.* v. *Hill*, 385 U.S. 374, 384, n. 7 (1967). Though of course a recognition of privacy rights as against the press—or, as in this case, against "kiddie porn" distribution—will have an impact on First Amendment values, virtually every scholar considering the question has concluded that personal privacy should have some protection against the "speech" of others.[15]

This Court took a giant step toward recognition of the State's right to establish an "area of privacy" for its citizens in *Zacchini* v. *Scripps-Howard Broadcasting Co.*, 433 U.S. 562 (1977), which considered one aspect of traditional privacy law in the context of First Amendment guarantees. There the Court recognized a "right of publicity" protecting a performer from the broadcast of his entire act on a TV news program. The Court held that First Amendment concerns must give way to the performer's "proprietary interest" in his act—a conclusion predicated on its belief that "neither the public nor respondent will be deprived of the benefit of petitioner's performance as long as his commercial stake in his act is appropriately recognized." 433 U.S. at 578.

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[15] *See, e.g.*, Tribe, *Constitutional Law* (1978) 649-51; Emerson, *The Right of Privacy and Freedom of the Press*, 14 Harv. C.R.-C.L.L. Rev. 329 (1979); Hill, *Defamation and Privacy Under the First Amendment*, 76 Colum. L. Rev. 1205 (1976); Prosser, *Privacy*, 48 Calif. L. Rev. 383 (1960). See also, Warren and Brandeis, *supra* note 31 ("It would doubtless be desirable that the privacy of the individual should receive the added protection of the criminal law . . . . [T]hat the community has an interest in preventing such invasions of privacy, sufficiently strong to justify the introduction of such a remedy, cannot be doubted." 4 Harv. L. Rev. at 219). *But see, Kahen, Privacy in Tort Law—Were Warren and Brandeis Wrong?*, 31 Law and Contemp. Prob. 326 (1966).

In this case a young boy's "act" was, without his informed consent, appropriated for the profit of another, and so his "proprietary interest" in his "performance" was impaired. Yet clearly property concepts are inadequate to resolution of the issues here, for it is not the child's "commercial stake" New York has tried to protect. Instead, the state seeks to prevent the "mental pain and distress, far greater than could be inflicted by mere bodily injury" [36] which is the horrible consequence for children of distributing sexually explicit films in which they have performed.[37] Against that desire must be weighed the interest of the public, asserted by Respondent, in having access to the sight of children in the midst of sexual intercourse, masturbation, bestiality, and sado-masochism.

The Court must decide whether the loss of such exhibitions is worth the gain in protection of children's interest in personal privacy. Is it possible, though, that a seasoned circus performer may punish the broadcast of his act on a TV news show[38] while a young boy must endure the continuous display of his sexual abuse in an adult movie theater?[39]

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[36] Warren & Brandeis, *supra* note 31, at 196.

[37] *See*, Point I-A *supra*.

[38] Or Mohammed Ali punish Playgirl Magazine for publishing a "portrait" (not photograph) of him in the nude, *Ali* v. *Playgirl, Inc.*, 447 F. Supp. 723 (S.D.N.Y. 1978). *See also Meeropol* v. *Nizer*, 560 F.2d 1061 (2d Cir. 1977) (Louis Nizer's private letters entitled to copyright protection), *cert. denied*, 434 U.S. 1013 (1978).

[39] It is worth noting that in this case, unlike *Cox Broadcasting Corp.* v. *Cohen*, 420 U.S. 469 (1975), the "speech" prohibited in the name of privacy is not contained in any public document or record. Unlike the subject of publicity in *Time, Inc.* v. *Hill*, 385 U.S. 374 (1967), moreover, sexually explicit photographs of young children could not be considered "newsworthy" items. See Restatement (Second) of Torts, §652D, Comment h (1977) ("There may be some intimate details of her life, such as sexual relations,

D. *In Its Attack on Child Pornography New York Properly Focused on the Need to Protect the Child Performers From Distribution of Such Material.*

The harm to a young child from participation in sexual intercourse, deviate sexual intercourse, bestiality, masturbation, or sado-masochistic abuse is not "supposed", as Respondent pretends;[40] it is coldly real. The additional, *separate* harms from distributing such films and photographs are just as inescapable. They are not harms produced by the distribution of any other type of material, and there is no way to prevent the harms from such distribution short of banning it altogether. Faced with a choice between a minimal effect on free expression from a ban on "kiddie porn", and the continued emotional torture of children who at some point have sold their bodies to make it, New York properly chose the former.

When confronted with a similar choice—between, on the one hand, a woman's First Amendment rights as well as her rights as a mother, and, on the other hand, the right of the State to regulate child labor—this Court made a similar election. *Prince* v. *Massachusetts,* 321 U.S. 158 (1944). The First Amendment does not permit parents "to make martyrs of their children," *Id.* at 170, nor does it require the State to stand by while children become martyrs to some theoretical public "right" to see "kiddie porn".

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which even the actress is entitled to keep to herself."). Sexually victimized children are not "public figures" who have relinquished some control over their privacy. *Compare, Gertz* v. *Robert Welch, Inc.,* 418 U.S. 32 (1974), with *Time, Inc.* v. *Hill,* 85 U.S. 374 (1967).

[40] Respondent's Brief, *supra* note 6, at 5.

II.

Because It Involves Trafficking in an Item Whose Very Production Is Illegal, and Because Such Trafficking Deepens the Harms Caused by Such Production, Distribution of Child Pornography May Be Declared a Crime.

Every citizen of this country is bound to the knowledge that any person "who employs [or] uses . . . any minor to engage in . . . sexually explicit conduct for the purpose of producing any visual or print medium depicting such conduct," is guilty of a federal crime *regardless* whether the final product is legally obscene.[41] 18 U.S.C. §2251(a). A majority of the states, including New York, have similar provisions.[42]

It was thus somewhat disingenuous of the Court of Appeals to remark that this case involves suppression of "materials which are traditionally entitled to constitutional protection . . . under the First Amendment." *People* v. *Ferber*, *supra*, 52 N.Y.2d at 678. Those materials are produced through the sexual abuse of children.[43] They threaten the psychological health and the privacy of those children while in circulation.[44] They are, moreover, viewed by students of the problems as "an adjunct or a tool to the crime" of "sexually assaulting and abusing children." [45] One state

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[41] One additional element that—either (1) the person "knows or has reason to know that such visual or print medium will be transported in interstate or foreign commerce or mailed," or (2) "that such visual or print medium has actually been transported in interstate or foreign commerce or mailed"—is included in the statute for jurisdictional purposes. 18 U.S.C. §2251(a).

[42] See Appendix A.

[43] *See* Point I-A, *supra*.

[44] *See* Point I-A, *supra*.

[45] *Sexual Exploitation of Children, A Report to Illinois General Assembly by the Illinois Legislative Investigatory Commission* 31 (1980). *Accord, Report to the Attorney General on Child Pornography in California* 14-15 (1977).

commission studying the problem declared, "The act of selling these materials is guaranteeing that there will be *additional* abuse of children." [46]

Distribution of sexually explicit performances by children is, therefore, far from an innocent activity; it deepens and extends the harms of the underlying crime of production. As such it is precisely like three federal crimes: the "disclosure" of information obtained by another through illegal wiretapping (18 U.S.C. §2511(1)(c) (1976 and Supp. III 1979)), the "promotion" of "racketeering" activities (18 U.S.C. §1952 (1976)), and the "transmission of wagering information" (18 U.S.C. §1084). None of these federal statutes has presented the courts with any constitutional difficulty.[47] Each of them is directed at "speech" which exacerbates the harms of illegal activity, even where the "speaker" was not directly involved with the underlying crime.

Because the filming of nonconsensual sexual conduct by a child is at least as great an invasion of his privacy as is electronic eavesdropping, for example, there is no principled distinction between the crime of "disclosing" the contents of an illegal wiretap (even a wiretap performed by another), 18 U.S.C. § 2511(1), and the crime of distributing "kiddie porn." [48] The nonconsensual character of the

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[46] *Texas House Select Committee on Child Pornography, Its Related Causes and Control* [hereinafter *Texas Select Committee*] 44 (1978) (emphasis added).

[47] See, *e.g.*, *United States* v. *Cerone*, 452 F.2d 274 (7th Cir. 1971) (anti-racketeering statute); *Truchinski* v. *United States*, 393 F.2d 627 (8th Cir. 1968), *cert. denied* 393 U.S. 831 (1968) (statute prohibiting transmission of wagering information); *United States* v. *Becker*, 334 F.Supp. 546 (S.D.N.Y. 1971) (anti-wiretapping statute). See also, *United States* v. *Nardello*, 393 U.S. 286 (1968) (construing and explaining anti-racketeering provisions).

[48] This Court has already construed with approval the anti-wiretapping provisions of the federal criminal code: "Contrary to the Government's assertion that the invasion of privacy is over

child's participation, indeed, makes "kiddie porn" in essence simply another type of contraband—like the product of illegal child labor (29 U.S.C. §212) or stolen goods (18 U.S.C. §662).[49]

As this Court must grow tired of repeating, the First Amendment is far from an absolute ban on assertion of legitimate governmental interests that affect speech.[50] When those interests include regulation of an underlying activity that is itself illegal, they are particularly powerful supports for limitations on speech: thus a newspaper's placing of job advertisements in gender-designated columns, so furthering illegal sex discrimination, may be enjoined. *Pittsburgh Press Co.* v. *Pittsburgh Comm'n on Human Relations*, 413 U.S. 376, 389 (1973). *See, New York*

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and done with, to compel the testimony of these witnesses [the subjects of an illegal wiretap] compounds the statutorily proscribed invasion of their privacy by adding to the injury of the interception the insult of the compelled disclosure. And, of course, [federal law] makes illegal not only unauthorized interceptions, but also the disclosure and use of information obtained through such interceptions. 18 U.S.C. §2511(1) . . ." *Gelbard* v. *United States, supra*, 408 U.S. at 51-52.

[49] While it is true that motion pictures are excluded from the provisions of the federal child labor statute, 29 U.S.C. §213(c)(3), newspapers and magazines clearly are not. Thus if the *New York Times* made use of a child in "oppressive child labor," in printing its newspapers, the shipment of those papers across state lines would violate federal law. *Cf. Wirtz* v. *Keystone Readers Service, Inc.*, 282 F.Supp. 871 (S.D. Fla. 1968) (magazine subscription service violated 29 U.S.C. §212 in employing high school student at below minimum wage).

[50] *See, e.g., Central Hudson Gas & Electric Corp.* v. *Public Service Comm'n of N.Y.*, 447 U.S. 557, 562-63 (1980); *Friedman* v. *Rogers*, 440 U.S. 1, 9-10 (1979); *Ohralik* v. *Ohio State Bar Ass'n*, 436 U.S. 447, 456 (1978); *Paris Adult Theatre I* v. *Slaton*, 413 U.S. 49, 64 (1973); *Miller* v. *California*, 413 U.S. 15, 23 (1973); *United States* v. *O'Brien*, 391 U.S. 367, 376 (1968); *Roth* v. *United States*, 354 U.S. 476, 484-85 (1957); *Breard* v. *Alexandria*, 341 U.S. 622, 644-45 (1951); *Chaplinsky* v. *New Hampshire*, 315 U.S. 568, 571-72 (1942).

Times Co. v. *United States*, 403 U.S. 713, 733-40 (1971) (White, J., concurring). So, too, a lawyer's in-person solicitation of a client—because of its grave potential for fraud and undue influence—may be proscribed even in the face of First Amendment guarantees protecting attorney advertising in general. *Ohralik* v. *Ohio State Bar Ass'n*, 436 U.S. 447 (1978).[51]

"Abuse for profit is manifested in child prostitution and child pornography and has created a multimillion dollar industry built on physical and psychological brutalization of thousands of our young citizens."[52] New York, in attacking distribution of "kiddie porn," is striking at the economic linchpin of that industry, and perhaps the most damaging part of the "brutalization" process as well.[53] In so doing it is not attacking the legitimate expression of ideas, only suppressing criminal activity inimical to the well-being of its youth. See, *United States* v. *O'Brien*, 391 U.S. 367, 376 (1968).

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[51] The prohibition of in-person solicitation by an attorney may, at first, seem merely a "time, place and manner" regulation subject only to limited judicial scrutiny. The Court in *Ohralik* did not treat it as such, however, preferring to treat it as a "content" regulation but one falling within "commercial speech" subject to reasonable state regulation. 436 U.S. at 456.

[52] Texas Select Committee, *supra* note 46, at 44.

[53] See text to notes 14-20, *supra*.

III.

The Lower Court's Focus on the Place of Production Rather Than That of Distribution of Child Pornography Was Clear Error.

The refusal of the Court of Appeals to examine the harms to a child "star" from distribution of pornographic films was undoubtedly the key factor subverting its capacity to analyze the statute before it. Indeed, the court's conceptual failure on this point led in its opinion to one particularly unfortunate excrescence: the statement that it is "troublesome" for New York to attack the distribution of materials in which "the [sexual] act recorded may have occurred in another State or county where such conduct may not be prohibited." *People* v. *Ferber*, 52 N.Y.2d at 680.

The Court of Appeals' doubts are completely without basis. Distribution of "kiddie porn" causes harm to the children so displayed at the place of the display: it is there that their private conduct is made public; it is there that their reputations are permanently damaged. It is elementary that "where harm is done to the reputation of a person, the place of wrong is where the defamatory statement is communicated." Restatement of the Law of Conflict of Laws (1934), §377, Rule 5. Criminal prosecution for libel is proper wherever the libelous article was published or circulated, not where it was written or printed. *Sachs* v. *Government of Canal Zone*, 176 F.2d 292 (5th Cir. 1949), *cert. denied*, 338 U.S. 858 (1949). A crime involving the mailing of a letter is triable in the place where the letter was received, *In re Palliser*, 136 U.S. 257 (1890); a conspiracy may be punished in the place of the overt act as well as of the criminal agreement, *Hyde* v. *United States*, 225 U.S. 347 (1912); and a mur-

der is most properly punished in the state where the bullet hit its mark, not where it was fired. *United States* v. *Davis*, 2 Sumner 482, 25 Fed. Cas. 786 (Cir. Ct. Mass. 1836) (Story, J., as circuit justice). Thus the injuries to children from display of "kiddie porn" should be redressed and punished in the jurisdiction of impact—the site of distribution.

On a less theoretical level, it seems clear that a "kiddie porn" producer would have to search long and hard for a jurisdiction in which to produce his films legally. Federal law,[54] of course, as well as the laws of almost every state,[55] prohibit production of "kiddie porn", as do the laws of other western countries with an equal commitment to the fundamental values of free expression. Production and distribution of "kiddie porn" without regard to its obscenity is punished as a crime in the United Kingdom,[56] West Germany,[57] Sweden,[58] and probably other countries as well.[59] New York is simply punishing what would be considered a heinous act in any civilized society.

It is an indication of the bankruptcy of the Court of Appeals' position on this point that Respondent has not even referred to this line of reasoning in arguing for the cor-

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[54] 18 U.S.C. §§2251-2253 (Supp. III 1979).

[55] See Appendix A.

[56] Protection of Children Act of 1978, Chapt. 37.

[57] German Penal Code, Paragraphs 176 and 184.

[58] Swedish Criminal Code, Chapt. 16, Paragraph 10.

[59] *See, e.g.*, French Penal Code, Art. 3419. According to Fred Cohen, Executive Director of Odyssey Institute, "The Europeans have much stronger laws against using kids in this way . . . Ninety percent of all child porno in the world comes from America." Quoted by Rep. Robert A. Young, *Congressional Record* (April 26, 1977) 12318. Some western democracies, of course, take a far stricter view than does the United States regarding obscenity. *See, e.g.*, Rangel, *Mexican Law on Obscenity*, 7 Law Am. 337 (1975).

rectness of the decision below. That the Court of Appeals could find "troublesome" so undisputed a principle is an indication of how far off course it would drift in the far more troubled seas of First Amendment analysis.

IV.

Photographs and Motion Pictures as a Form of Speech Should Be Subject to Reasonable Regulations for the Protection of Performers, and This Statute Is Such a Regulation.

That films and photographs are part of the "speech" protected by the First and Fourteenth Amendments is not open to doubt. *Joseph Burstyn, Inc.* v. *Wilson,* 343 U.S. 495 (1952). Yet even while proclaiming that postulate in *Joseph Burstyn,* the Court was careful to note: "It does not follow that the Constitution requires absolute freedom to exhibit every motion picture of every kind at all times and all places. . . . Nor does it follow that motion pictures are necessarily subject to the precise rules governing any other particular method of expression. Each method tends to present its own peculiar problem." 343 U.S. at 502-03.

Even a passing consideration of the nature of photographic "speech" points to the wisdom of the Court's *caveat.* Unlike the spoken or written word, photographs of men and women require the participation of more than one person—both the person photographed and the photographer. In the case of commercial pictures, of course, thousands of people may be involved; yet only a handful may have any authority to determine the content of the final product, the "speech" which the Constitution protects.

The performers in filmed "speech" are in a particularly awkward position, for the photography constitutes a perma-

nent record of their actions. The photographs or film may, in fact, represent a conception of the photographer unknown to the photographed subjects at the time of filming—yet their faces are ultimately linked inextricably in viewer's mind with the "speech" contained in the film. In this case, indeed, the type of film before the Court involves a record of activity by the child performers to which they are incapable, as a matter of law, of giving an "informed consent." *See, Elkington* v. *Foust*, 618 P.2d 37 (Utah 1980). Because the filmed activity is in fact intimate sexual conduct, the child performer is associated, involuntarily, with "speech" of a particularly revealing and degrading kind.

In *Zacchini* v. *Scripps-Howard Broadcasting Co.*, 433 U.S. 562 (1977) this Court recognized the *property* interest of a performer in his filmed performance—a principle wholly consistent with a writer's copyright powers over his writing. The children shown in the films sold by Respondent presumably have similar "property" rights; yet it seems more appropriate to view their position not from the standpoint of property but from that of basic human dignity. *Compare, Olmstead* v. *United States*, 277 U.S. 438 (1928) *with Katz* v. *United States*, 389 U.S. 347 (1968). Because a child "is not possessed of that full capacity for individual choice which is the presupposition of First Amendment guarantees," *Ginsberg* v. *New York*, 390 U.S. 629, 649-50 (1968) (Stewart, J., concurring), he becomes permanently associated with "speech" involuntarily.

In a "kiddie porn" movie, therefore, the "speech" is not that of the child performer. If "speech" we must call it, it is the speech of the director or photographer. Once that is acknowledged, however, it is clear that the New York statute is not, as the court below thought, a regulation of the "content" of speech, but rather simply of the *manner* in which speech (that is, the idea or image of juvenile sex) is

presented. No one is being ordered to cease speaking or making movies about adolescent sex. New York has simply declared that in presenting a point of view on that subject the "speaker" may not make use of children's actual bodies in specifically defined "hard-core" sexual conduct, whether in person or in a photograph.

As a regulation simply on the *manner* of self-expression, this statute easily passes muster, for it fulfills the test that it "serve significant state interests . . . [and] leave open adequate alternative channels of communication." *Schad* v. *Borough of Mt. Ephraim*, —— U.S. ——, 68 L.Ed. 2d 671, 684-85 (1981); *Grayned* v. *City of Rockford*, 408 U.S. 104 (1972). Protection of children from sexual abuse is a state interest of the highest order. As for "adequate" alternatives to films of children in full sexual thrall, is it not reasonable to ask Respondent to hire underdeveloped adults, or better, to write a book?

New York Penal §263.15 does no more than reasonably restrict the manner in which an adult can exercise his freedom of speech through a camera lens. It is a law "to protect the weak, the uninformed, the unsuspecting, and the gullible from the exercise of their own volition." *Paris Adult Theatre I* v. *Slaton*, 413 U.S. 49, 64 (1973).

CONCLUSION

The "peculiar vulnerability" of children, *Bellotti II*, 443 U.S. 622, 634 (1979), largely puts them at the mercy of their elders. As Jane Addams wrote during the long struggle for child labor legislation, "We may either smother the divine fire of youth or we may feed it".[62] New York in this

[62] Excerpt from *The Spirit of Youth and the City* (1910), reprinted in Bremner, *Children and Youth in America*, Vol. II (1971) 85. *See* Appendix E.

case has valiantly attempted to interpose its police power between the greed of "kiddie porn" promoters and the hapless children threatened with public humiliation and degradation.

The interests of those children must be paramount in any dispassionate analysis of New York's effort. Yet this case demonstrates how the interests of the individual child performers are intimately linked with other societal interests of the highest importance. Those children in their weakness and immaturity argue for the existence of "the right to be let alone—the most comprehensive of rights and the right most valued by civilized men," *Olmstead* v. *United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting)—even in the face of our concern for legitimate avenues of self-expression. They argue, too, for the existence of state power to regulate "speech" which is the fruit of illegal activity and harmful in itself. The obvious damage sustained by children in the production of "kiddie porn", finally, illustrates the need to permit some regulation of photographic "speech" in order to protect the subjects photographed.

No mere law will obliterate the long legacy of child exploitation that has culminated in a multi-million dollar child pornography industry. Yet here New York has acted reasonably and responsibly to protect "society's transcendent interest in protecting the welfare of children" [63] to the full extent of its power. Surely, in light of that interest, "kiddie porn" is "utterly without redeeming social importance," *Roth* v. *United States*, 354 U.S. 476, 484-85 (1957), and thus alien to the great values which give life to the First Amendment. The need of some pathetic souls for

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[63] *Ginsberg* v. *New York*, 390 U.S. 629, 640 (1968) (*quoting People* v. *Kahan*, 15 N.Y.2d 311, 312 (1965) (Fuld, J. concurring)).

vicarious, perverse pleasure should not be permitted to make thousands of children martyrs to sexual mass marketing.

The decision of the New York Court of Appeals should be reversed.

Respectfully submitted,

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